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BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

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Notice of Proposed Rulemaking re 14 CFR Part 93, High Density Airports; Allocation of Slots (U.S.-Canada)	)	FAA-1999-4971-10

REPLY OF UNITED AIR LINES, INC.
AND MOTION FOR LEAVE TO FILE

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DATED: March 2, 1999

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Notice of Proposed Rulemaking re 14 CFR Part 93, High Density Airports; Allocation of Slots (U.S.-Canada)	)	FAA-1999-4971

DATED: March 2, 1999

REPLY OF UNITED AIR LINES, INC. AND MOTION FOR LEAVE TO FILE

In its initial comments herein, United Air Lines, Inc. ("United") urged the FAA to make clear in the fmal rules that it will permanently stop withdrawing from U.S. airlines at O'Hare the **14** domestic slots it will no longer allocate to Canadian carriers if the rules proposed in the Notice are adopted. On February 19, 1999, American Airlines filed a Reply in this docket opposing the clarification United requested. United hereby replies to American. To the extent required, United requests leave to file. To the extent American's Reply is accepted, United's response should be also accepted in the interest of ensuring that the FAA has a complete record on which to base its final rules, and to ensure that all interested persons have had a full and fair opportunity to participate in this rulemaking.

In opposing the clarification sought by United, American argues that United has twice before unsuccessfully raised the same issue with the FAA. This claim simply is not true. In the other proceedings American is referring to, United was urging the FAA to

end its practice of withdrawing domestic slots from United to allocate to carriers providing foreign air transportation at O'Hare. In the present rulemaking, it is the FAA itself, not United, that is proposing to stop withdrawing 14 domestic slots at O'Hare each traffic season from U.S. airlines for allocation to Canadian airlines. Thus, the prior proceedings to which American refers are simply irrelevant to the issues raised in the present proceeding. American's selective quotations from those proceedings, which form the sole substantive support for its position, have no bearing whatsoever on the issues raised by the FAA's proposal.

As United explained in its Comments, the return of these 14 domestic slots to their U.S. carrier holders -- whether United or American -- will secure far more substantial consumer and competition benefits than would the FAA's continued withdrawal of these slots for allocation to other foreign airlines. See United Comments at 9-10. Notably, nowhere in its Reply does American attempt to demonstrate that the public interest would be better served by the FAA's continued withdrawal of these slots.

Moreover, even if it were not abundantly clear that the public would benefit more from leaving these 14 slots with their U.S. holders than from continuing to withdraw them for allocation to foreign airlines, changes in Federal law adopted by Congress in 1993 preclude the FAA from continuing to withdraw these 14 slots now that they are no

longer needed by the foreign carriers to which they were previously allocated.' See United Comments at 4-5 and 8-9.

In the prior cases American relies upon in opposing United's request, the FAA was concerned that if it restored to United slots withdrawn seasonally from it at O'Hare, it would not be able to provide slots to those carriers that were using the withdrawn slots, resulting in no net gain in service. See, e.g., Exemption No. 6743, issued March 25, 1998 at 10. This is no longer a concern as the FAA is proposing to create new slots for Canadian carriers to use at O'Hare, replacing those previously withdrawn from U.S. carriers. The FAA is not, however, proposing to stop withdrawing domestic slots entirely. Thus, returning those 14 withdrawn slots to their U.S. holders will not preclude the FAA from continuing to provide other carriers providing foreign air transportation service at O'Hare with the slots that have been allocated to them historically by withdrawals from domestic service where these carriers may need such slots to continue their historical level of O'Hare operations.

Furthermore, even if concerns about foreign carriers' ability to continue serving O'Hare were valid when the FAA denied United's exemption requests, this is no longer

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[1] American attempts to overcome the clear intent of Congress in capping slot withdrawals in 1993 by suggesting the FAA may have allocated slots at O'Hare to carriers that were not serving the airport as of October 31, 1993. Whether that is so or not is wholly beside the point. Even assuming American is correct, any action by the FAA in violation of the limitations Congress imposed on its discretion to withdraw domestic slots at O'Hare would be ultra vires and hardly can be relied upon to justify further withdrawals beyond those Congress has authorized.

the case. DOT recently has proposed to eliminate the High Density Rule at O'Hare, LaGuardia and JFK because, according to the Department, technological developments over the last 30 years have eliminated the need for slot restrictions at these airports.* If the Department believes the High Density Rule ("HDR") is no longer needed at O'Hare, it follows a fortiori that there is no need for the FAA to continue withdrawing domestic slots from U.S. airlines to allocate to foreign airlines. So long as the HDR remains in effect, foreign airlines needing slots at O'Hare can obtain them by filing exemption applications with DOT under the terms of 49 U.S.C. § 41714(b). The Secretary can grant such applications whenever doing so would be consistent with the public interest. Certainly, in light of DOT's legislative proposal, no application would ever have to be denied by the Secretary because of inadequate airside capacity at O'Hare to grant the application.

Finally, American claims that it would be improper for the FAA to address United's proposal regarding the return of domestic O'Hare slots because the "matter is not at issue in the NPRM." Reply of American at **1.** American's argument is utterly without legal basis. All that the Administrative Procedure Act requires for agency rules

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[2] ***See Clinton Administration Unveils FAA Reauthorization – Proposal Modeled on Best Reinventing Government Principles,*** U. S. Department of Transportation, Office of the Assistant Secretary for Public Affairs, DOT 20-99, Press Release dated February 8, 1999.

to be valid is that the notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). This statutory language makes clear that a notice need not specify every precise proposal that an agency might ultimately adopt; a notice is adequate if it apprises interested parties of the issues to be addressed in the proceeding with sufficient clarity to allow them to participate in the rulemaking in a meaningful and informed manner. American Medical Assoc. v. United States, 887 F. 2d 760, 767 (7th Cir. 1989).[3]

The notice the FAA issued here clearly put interested persons on notice that the agency is considering possible changes in the HDR at O'Hare to reflect the terms of the new Air Services Agreement signed by the U.S. and Canada in 1995. The rule clarification sought by United is certainly well within the "subjects and issues involved," as demonstrated by United's and American's participation in the proceeding. Certainly, American could not be heard to complain that, if the FAA adopts the clarification United proposes, American lacked adequate notice that the FAA might adopt such a rule and, therefore, did not have a meaningful opportunity to participate in the proceeding.

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[3] See also, Int'l Harvester Co. v. Ruckelshaus, 478 F. 2d 615 (D.C. Cir. 1973) ("surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." Id. at 632 n. 5 1, quoting Owensboro on the Air v. United States, 262 F. 2d 702, 708 (D.C. Cir. 1958); 3 Jacob A. Stein, et. al., Administrative Law § 15.03 [2] (1999) ("[T]he final rule is not required to be identical to the proposed rule"); Alfred C. Aman & William T. Mayton, Administrative Law. §2.1.3 (1993) ("[a]n agency change in position during a rulemaking usually shows that the rulemaking process has been effective").

Moreover, even if it were assumed that the FAA's adoption of the clarification represented a change in course by the agency, a well-established body of administrative law holds that "an agency's change of course, so long as generally consistent with the tenor of its original proposals, indicates that the agency treats the notice-and-comment process seriously, and is willing to modify its position where the public's reaction persuades the agency that its initial regulatory suggestions were flawed." American Medical Association, supra at 767, footnote omitted. Moreover, a final rule should be a "'logical outgrowth"' of the original proposal. Id., footnote omitted. Here, it is clear that the clarification United is seeking would be a "logical outgrowth" of the FAA's original proposal.

In short, American's argument is both legally and factually incorrect and should be disregarded. To be consistent with the limitations Congress has imposed on the FAA's authority to withdraw domestic slots at O'Hare for allocation to foreign carriers and to promote competition and new service at O'Hare, the FAA should, in the final rules adopted herein, make clear that it will permanently stop withdrawing from U.S. carriers at

O'Hare the 14 domestic slots it has proposed no longer allocating to Canadian carriers for transborder service.

Respectfully submitted,

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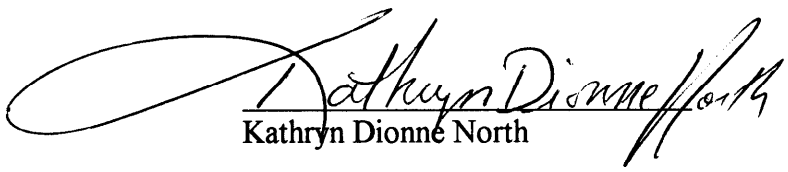
DATED: March 2, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Reply of United Air Lines, Inc. And Motion For Leave To File on all persons named on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.



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DATED: **March 2, 1999**

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